Gateway to Termination: Supreme Court Narrows "Repeated Defaults" Termination

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Contracts in the energy and construction sectors regularly provide a party with a right to terminate for specified defaults by their counterparty. Where, for example, an employer fails to pay on time, this may only give rise to a right to terminate if the contractor notifies the employer of the default and requires it to remedy the breach (i.e. make payment) within a contractually specified period and the employer fails to do so. The contractor may not terminate, but to what extent is that previous default relevant if the employer fails to pay on time again?

This was the issue considered by the Supreme Court in *Providence Building Services Limited v. Hexagon Housing Association Limited*[1]. While the decision concerns a JCT Design and Build Standard Form (2016) (**JCT D&B 2016**), it provides useful guidance on the interpretation of termination clauses where there are repeated defaults incorporating cure periods as well as how the courts will approach amended versions of widely used standard form contracts, such as those commonly used in the energy and shipping sectors.

Background Facts
The dispute concerned a construction contract for the development of buildings in Purley, London, based on JCT D&B 2016, as amended (the **Contract**).

Clause 8.9 of the Contract provided that:

"1. If the Employer does not pay by the final date for payment the amount due to the Contractor [...], the Contractor may give to the Employer a notice specifying the default or defaults (a 'specified' default or defaults).
[...]

3. If a specified default continues for 28 days from the receipt of notice under clause 8.9.1[...], the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.

4. If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not) the Employer repeats a specified default [...], then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

A Payment Notice was issued to the Employer, but it failed to pay by the due date (15 December 2022) and received a Notice of Specified Default from the Contractor (16 December 2022), after which it paid the sum due (29 December 2022). It was common ground that as the specified default was cured within 28 days, it was not open to the Contractor to serve a notice to terminate under clause 8.9.3 in respect of that late payment.

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Five months later, on 17 May 2023, the Employer had again failed to pay a sum due under a Payment Notice on time. The Contractor, relying on clause 8.9.4, sought to terminate the Contract on 18 May 2023, 28 days after the Payment Notice was issued, on the grounds of repeated default. The Employer rejected this, asserting that the termination was invalid and amounted to a repudiatory breach by the Contractor.

First Instance and Court of Appeal Judgments

Following an adjudication on the dispute, the Contractor asked the court to consider the correct interpretation of clause 8.9.

The Technology and Construction Court (**TCC**) found for the Employer[2]. It held that, to rely on clause 8.9.4, the Contractor must first have accrued a right to terminate under clause 8.9.3 – that is, the earlier default must have remained unremedied for the full 28-day cure period.

The Court of Appeal disagreed[3]. The leading judgment given by Stuart-Smith LJ concluded that the natural reading of clause 8.9.4 did not require an accrued termination right under clause 8.9.3. It considered that this reading mirrored the termination rights given to the Employer under clause 8.4 of the Contract for repeated specified defaults by the Contractor. In that clause, the Employer's right to terminate for repeated defaults also provided that this was "whether as a result of the ending of the specified default or otherwise". To achieve symmetry between the parties' rights, the Court of Appeal considered that it should not matter whether the terminating party has previously had an accrued right to terminate under clause 8.9.3.

The Court of Appeal further noted that the TCC's approach could produce commercially undesirable results, allowing the Employer to repeatedly pay up to 27 days late without exposing itself to lawful termination because the Contractor's right to terminate would not arise despite repeated defaults.

The Supreme Court's Judgment

The Supreme Court disagreed and found that the Contractor was in repudiatory breach due to its wrongful termination. In a judgment given by Lord Burrows, it was held that the Contractor could terminate for repeated specified defaults only if an earlier specified default was not cured within 28 days, thereby giving rise to a clause 8.9.3 termination right. Reading clause 8.9.4 otherwise would render its opening words, which refer to the further notice under clause 8.9.3, redundant. Clause 8.9.3 was to be treated as a gateway to termination under clause 8.9.4.

The Supreme Court also considered that there was no reason why clause 8.4 (Employer's termination rights) and clause 8.9 (Contractor's termination rights) should be symmetrical, and concluded that the textual differences between the two clauses such as the cure periods were deliberate.

The Supreme Court also noted that the Contractor's interpretation would produce commercially disproportionate consequences for the Employer. It would mean that, for example, if the Employer made two minor late payments (each remedied within a day), the Contractor would be entitled to terminate, which in the court's view was using a sledgehammer to crack a nut. It also did not consider that it was appropriate for the court to adopt an interpretation that would help to combat the Contractor's cash-flow problems caused by late payment if that was not what the clause provided, particularly if there were alternative remedies such as suspension rights, payment of statutory interest and the right to refer disputes to adjudication.

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Finally, the Supreme Court reaffirmed its approach to interpretation of industry-standard form contracts. As with all commercial contracts, their meaning under English law is determined by applying an objective and contextual approach. It added, however, that where the standard form has been negotiated by parties on all sides of a particular industry (so not a "take it or leave it" standard form), the court may have regard to accompanying guidance notes, but not to earlier editions of the standard form and court decisions unless directly relevant.

Implications

The Supreme Court's decision, although given in the context of an amended version of a JCT standard form contract, raises the following important points for energy and maritime contracts:

1. When it comes to drafting termination provisions, careful attention should be paid to any textual differences between reciprocal termination clauses as courts will likely assume such differences are deliberate and will not excuse any performance which does not comply with the precise terms of the relevant clause.
2. Where a right to terminate arises when a party "repeats a specified default", the addition of words such as "whether as a result of the ending of the specified default or otherwise" will (all other things being equal) create a termination right that can be exercised without a previous right to terminate having accrued. Where this wording is not included, a prior unremedied specified default must have accrued before the right to terminate can be exercised.
3. The principles used to interpret industry-standard forms apply equally to the energy and maritime sector as Lord Burrows expressly cited bills of lading, charterparties and contracts of sale in the commodity markets as examples in his judgment.

[1] [2026] UKSC 1.

[2] [2023] EWHC 2965 (TCC).

[3] [2024] EWCA Civ 962.

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